

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOVETTA V. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

*Docket No. 00-1097; Submitted on the Record;
Issued April 26, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant was entitled to intermittent wage-loss compensation for the period January 1, 1990 through February 1, 1995 due to her accepted employment injuries; (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a); and (3) whether the Office met its burden of proof to terminate appellant's compensation benefits effective January 4, 2000.

On September 10, 1985, September 5, 1988 and February 29, 1992, appellant, born on December 24, 1955, filed claims for occupational disease (Form CA-2), alleging that she developed upper extremity muscle strains and carpal tunnel syndrome as a result of performing repetitive tasks in the various positions she performed with the employing establishment. On February 3, 1986 the Office accepted appellant's initial claim for right trapezius muscle spasm and strain. The Office subsequently expanded its acceptance to include bilateral carpal tunnel syndrome and left lateral epicondylitis.

The record reflects that from January 1, 1990 and February 1, 1995, appellant was working restricted duties, having been released to work with restrictions in October 1989 by Dr. Richard LeClair, as noted in his report dated January 31, 1990. In a September 24, 1992 report, he noted that he had seen appellant on August 15, 1991 and June 23, 1992 and that she was functioning well on light duty. In a report dated September 23, 1993, Dr. LeClair stated that appellant had positive findings and that time off work was approved for the period December 1, through 6, 1992. In subsequent reports, submitted on a periodic basis, Dr. LeClair indicated that appellant should continue to work with restrictions and further noted that she had been pregnant in 1992 and suffered from diabetes.

On June 30, 1997 appellant filed a claim for compensation (Form CA-7), for intermittent lost wages during the period January 1, 1990 through February 1, 1995.¹

In a decision dated January 8, 1999, the Office denied appellant's claim for intermittent periods of wage-loss compensation on the grounds that she had failed to specify the dates she was claiming. Appellant requested an oral hearing before an Office hearing representative, which was held on August 4, 1999. At the hearing, the Office advised appellant to specify the dates for which she claimed lost time due to her accepted upper extremity conditions and to provide medical evidence for each claimed date. She stated that she had identified the specific dates and would submit the corresponding medical evidence.²

Subsequent to the hearing, appellant submitted a copy of a February 25, 1999 letter written to her medical provider, listing each of the dates for which she was claiming compensation.³ In addition, she submitted information from the employing establishment, including time analysis reports (Form CA-7a), detailing the dates on which she was without pay or using leave.⁴

In a decision dated October 14, 1999, an Office hearing representative granted a maximum of four hours of compensation for March 1 and 22, 1990, October 12 and 20 and November 17, 1993, March 12 and May 31, 1994. The hearing representative explained that these were the only claimed dates for which the medical evidence supported that appellant was in nonwork status and received medical care. The Office hearing representative denied the remainder of appellant's request for compensation for disability because appellant had either failed to submit evidence that she was in nonwork status, or failed to establish total disability for those dates.

¹ Appellant also indicated that she had held part-time jobs during this period.

² At the hearing appellant also stated that she was claiming compensation for intermittent periods between 1985 and 1990, however, the Office informed her that as the Office's prior decision only addressed the periods 1990 to 1995, the proceeding would be restricted to those dates.

³ Appellant listed each date for which she was claiming compensation between January 4 through February 25, 1995. Appellant claimed compensation for the following periods: January 11 and 31, 1990; February 23, March 7, 12, 15, 17, 22, 27 and 31, August 6 and 9 and December 13, 1990; February 18 and 25, July 29, August 5 and October 18 and 21, 1991; January 15 and 17, March 5 and 6, April 20 and 23, June 26 and 27, July 13 and 21 and December 3 and 5, 1992; April 12 and 14, August 2 and 4, September 26, October 7, 12, 20, 27 and 29, November 16 and 17 and December 1 and 5, 1993; January 3, 4, 10 and 11, February 2 and 28, March 1, 4, 11, 15 and 29, April 4, May 30, June 2, August 1 and 3, September 5, 9 and 26, October 1, 23, 26, 28, 29 and 31, November 2, 9 and 11 and December 23, 1994; January 10, 11 and 26 and February 8, 1995. The Board notes that the claimed dates December 1 and 5, 1993 and December 24, 1994, are in addition to those dates noted by the Office hearing representative.

⁴ The evidence of record establishes that appellant was either without pay or using leave for most of the claimed dates, with the exception of August 18 and 20, 1991, February 23, March 29, April 4, August 1 and 3, September 5 and 9 and October 23, 1994. The Board notes that while in addition to these dates, the Office hearing representative found that appellant had not established that she was on leave or without pay on August 6 and 7, 1990, the record does in fact establish that appellant used sick leave from August 6 to 9, 1990.

By letter dated October 21, 1999, appellant requested reconsideration of the Office's October 14, 1999 decision, claiming entitlement to eight hours of leave for each day claimed and further stating that she had submitted all of the relevant medical and factual evidence necessary to process her claimed disability between 1985 and 1990. In a decision dated January 4, 2000, the Office denied appellant's request for reconsideration on the grounds that appellant's arguments were insufficient to warrant merit review of the prior decision.⁵

In a separate decision dated January 4, 2000, after giving appellant proper notice and the opportunity to respond, the Office terminated appellant's compensation and medical benefits.

The Board finds that appellant has established entitlement to four hours⁶ of wage-loss compensation for March 1, 15, 22 and 31, 1990, December 3, 1992, October 12 and 20, November 17 and December 2, 1993, March 12 and May 31, 1994 and January 27, 1995, as she has provided documentation that she was either on leave or without pay and had medical examinations on those days.⁷ However, appellant has not established any further entitlement to compensation for the other dates of disability claimed between January 1, 1990 and February 1, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act⁸ has the burden of establishing the essential elements of his or her claim including the fact that the injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁹ As used in the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁰ Disability is thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹¹ Whether a

⁵ The Office noted that appellant had not yet submitted medical evidence supporting her claim for compensation for intermittent dates between 1985 and 1990. The Board notes that contrary to the Office's statement, the record is replete with medical evidence pertaining to this time frame. Appellant has specified the dates she is claiming between 1984 and 1990 has submitted leave time analysis reports from the employing establishment and has submitted supporting medical evidence. On return of the case record, this period should be adjudicated by the Office.

⁶ The Office's procedures specify that for a routine medical appointment, a maximum of four hours of compensation is usually allowed. CA-810, Chapter 2.E(5), *Lost Wages for Medical Treatment* (Revised January 1999).

⁷ The Board notes that these dates include all seven dates granted by the Office hearing representative and five additional claimed dates for which appellant also submitted sufficient medical and factual evidence: March 15 and 31, 1990, December 3 and 2, 1993 and January 27, 1995.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

¹¹ *See Fred Foster*, 1 ECAB 21 (1947).

particular injury caused an employee disability from employment is a medical issue, which must be resolved by competent medical evidence.¹²

With respect to claimed disability for medical treatment, section 8103 of the Act provides for medical expenses, along with transportation and other expenses incidental to securing medical care, for injuries.¹³ Appellant would be entitled to compensation for any time missed from work due to medical treatment for an employment-related condition.¹⁴ However, the Office's obligation to pay for medical expenses and expenses incidental to obtaining medical care, such as loss of wages, extends only to expenses incurred for treatment of the effects of any employment-related condition. Appellant has the burden of proof, which includes the necessity to submit supporting rationalized medical evidence.¹⁵

With respect to March 1, 15, 22 and 31, 1990, December 3, 1992, October 12 and 20, November 17 and December 2, 1993, March 12 and May 31, 1994 and January 27, 1995, for which appellant claims wage-loss compensation, the Board finds that the record established that she had medical treatment and was either without pay or using leave on each of those dates. Appellant submitted treatment notes for each of the above dates, indicating that she saw her attending physicians for treatment related to her accepted employment injuries. These reports, in conjunction with appellant's time analysis reports (Form CA-7a), establish that she is entitled to four hours of compensation for lost time from work due to routine medical treatment provided due to her employment injury.

The Board notes that the record is devoid of medical evidence pertaining to most of the remaining claimed dates for which the record establishes that appellant was without pay or using leave, including: January 11 and 31, February 23 and 28, March 2, 7, 12, 14, 16, 17, 21, 27 and 30, August 6 and 9 and December 13, 1990; February 18 and 25, July 29, August 5, October 18 and 21, 1991; January 15 and 27, March 5 and 6, April 20 and 23, June 26 and 27, July 13 and 21 and December 4 and 5, 1992; April 12 and 14, August 2 and 4, September 26, October 7, 13, 19, 27 and 29, November 16 and December 1, 3 and 5, 1993; January 3, 4, 10 and 11, February 28, March 1, 11, 13 and 15, May 30, June 1 and 2, September 26, October 1, 24, 28, 29 and 31, November 2, 9 and 11 and December 23, 1994; and January 10, 11, 6 and 28 and February 8, 1995.

In support of her claim for wage-loss compensation for these remaining dates, appellant submitted numerous disability slips, form reports and brief statements from Dr. LeClair and his associates at Kaiser Permanente, none of which contain any rationalized explanation as to why appellant was unable to continue to perform her restricted duties on these dates claimed between January 1, 1990 and February 1, 1995. An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between her

¹² See *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹³ 5 U.S.C. § 8103(a).

¹⁴ *Vincent E. Washington*, 40 ECAB 1242 (1989).

¹⁵ *Dorothy J. Bell*, 47 ECAB 624 (1996); *Zane H. Cassell*, 32 ECAB 1537 (1981).

condition and her employment.¹⁶ To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the employment factors identified by appellant as causing her condition and, taking these factors into consideration as well as finding upon examination of appellant and her medical history, state whether the employment injury caused or aggravated appellant's diagnosed conditions and provide medical rationale in support of his opinion.¹⁷

Appellant failed to submit sufficient medical evidence in this case and, therefore, has failed to discharge her burden of proof. The reports submitted by Dr. LeClair and his associates at Kaiser Permanente are not sufficient to meet appellant's burden of proof as they do not offer medical rationale explaining the causal relationship as to how or why appellant's accepted employment injury prevented her from performing the duties of her position on the particular dates listed.¹⁸ Instead they merely state conclusions without any discussion of the reasons why appellant was disabled on the dates in question. As appellant has failed to submit sufficient rationalized medical opinion evidence to establish that she was unable to work on the additional days she claimed she was unable to work due to her employment injury, she has failed to establish that she was disabled and thus, is not entitled to wage-loss compensation for additional days claimed. Without such evidence, appellant cannot establish her claim for additional intermittent wage-loss compensation during the period January 1, 1990 to February 1, 1995, with the exception of four hours for each of the twelve dates found by the Board to be compensable.

The Board further finds that, with respect to the Office's January 4, 2000 decision denying reconsideration, the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁹ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²⁰

In her October 21, 1999 request for reconsideration of the hearing representative's October 14, 1999 decision, appellant neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument

¹⁶ *William S. Wright*, 45 ECAB 498 (1994).

¹⁷ *Jean Culliton*, 47 ECAB 728 (1996); *Lucrecia M. Nielson*, 42 ECAB 583 (1991).

¹⁸ Medical reports not containing rationale on causal relationship are entitled to little probative value and are generally insufficient to meet appellant's burden of proof. *Lourdes Davila*, 45 ECAB 139 (1993).

¹⁹ 20 C.F.R. § 10.606(b)(2) (1999).

²⁰ 20 C.F.R. § 10.608(b) (1999).

not previously considered by the Office and did not submit any additional medical or factual evidence. Rather, appellant stated that she would submit additional medical evidence once it was received by her. She asserted that the record was incorrect in that it reflected acceptance for “left lateral epicondylitis,” when the medical evidence supported a finding of “right lateral epicondylitis.” Appellant further asserted that she had now submitted all relevant claims and supporting factual and medical evidence necessary for the Office to adjudicate her claim for intermittent compensation for the period January 4, 1985 to December 29, 1989. Appellant’s contentions regarding disability for any period from 1985 to 1989 and the acceptance of the epicondylitis condition are not relevant to the issue decided by the Office hearing representative and, therefore, they are insufficient to require further merit review of appellant’s claim.²¹ Finally, she asserted that she should be entitled to eight hours of compensation for each of the dates accepted as compensable by the Office, rather than the four allowed. The Board notes, however, that as appellant does not advance any additional medical evidence or legal argument in support of her assertion, her argument has no color of legal validity and, therefore, is insufficient to require the Office to reopen her claim for merit review.²²

Appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office. The Office properly refused to reopen appellant’s claim for a review on the merits.

The Board also finds that the Office met its burden of proof to terminate appellant’s compensation benefits effective January 4, 2000.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.²³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.²⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.²⁶

²¹ *Linda I. Sprague*, 48 ECAB 386 (1997).

²² *Marion Johnson*, 40 ECAB 735 (1989).

²³ *Mohammed Yunis*, 42 ECAB 325, 334 (1991).

²⁴ *Id.*

²⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

²⁶ *Id.*

In this case, on February 25, 1995 appellant's limited duty ended and the Office paid appropriate compensation benefits until March 1, 1999, when limited duty again became available and she returned to work.²⁷

On March 12, 1999 the Office referred appellant, together with a statement of accepted facts, the medical evidence of record and a list of issues to be addressed, to Dr. Glenn B. Pfeffer, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his narrative report dated May 24, 1999, Dr. Pfeffer noted appellant's history with respect to her accepted upper extremity conditions and reviewed the relevant medical evidence. Dr. Pfeffer performed a complete physical examination, noting that appellant had equal and normal shoulder, elbow, forearm, wrist and digit range of motion, with motor strength measured at 5/5 and pulses registering 2+. He further noted that her sensibility was intact, her two-point discrimination was 4 mm bilaterally, but she had a positive Phalen's sign bilaterally at 15 seconds causing paresthesias in her index and long finger. Appellant was also noted to have no focal tenderness over her cervical spine, paracervical muscles, or shoulders bilaterally, but did have a positive percussion sign over the ulnar nerve in both elbows. Her grip strength was measured at 27/27/25 on the left and 25/25/25 on the right. Appellant's arm circumference was 33 cm bilaterally and her forearm circumference was 27.5 cm on the left and 27 cm on the right. Dr. Pfeffer additionally noted that appellant had no evidence of epicondylar pain bilaterally and no focal bony tenderness. He concluded that appellant had probable bilateral tendinitis (repetitive strain injury) of both upper extremities, with a possible bilateral carpal tunnel syndrome. Dr. Pfeffer noted that appellant's electromyography and nerve conduction studies had been normal in the past, but that her history and examination were consistent with a diagnosis of carpal tunnel syndrome, bilaterally, in that she complained of night numbness in her median nerve distribution and had a positive Phalen's test bilaterally.

Dr. Pfeffer stated that he considered appellant's condition permanent and stationary, with essentially no objective factors of disability present, such as loss of grip strength, loss of motion or evidence of atrophy. He further stated that, he would recommend absolutely no more treatment for appellant, as she has had very extensive treatment, which had not given her any significant relief. Dr. Pfeffer reiterated that no further cortisone shots, occupational therapy, physical therapy, chiropractic care, or anti-inflammatories would be beneficial to her. He also stated that he did not recommend carpal tunnel surgery for appellant, as he felt the majority of her symptoms came from a tendinitis/repetitive strain injury of the upper extremities and not from her carpal tunnels and she had no evidence of medial or lateral epicondylitis in either elbow at the time of his examination. Dr. Pfeffer then reviewed appellant's most recent job offer, which included restrictions of no lifting greater than 10 pounds, no repetitive hand or elbow motions and only occasional reaching above the shoulder and stated that the job as described was

²⁷ In a report dated November 17, 1998, Dr. Harry S. Fung, appellant's treating physician at the time, stated that appellant could work eight hours a day in a position which involved no lifting greater than 10 pounds, no repetitive hand or elbow movements, no repetitive left wrist movement and only occasional reaching above the shoulder. On November 18, 1998 the Office prepared a job offer for a modified distribution clerk, eight hours a day, in accordance with the physical restrictions delineated by Dr. Fung. He reviewed and approved the job offer and on November 20, 1998 appellant accepted the position. The Office subsequently decided to allow appellant to delay her return to work so that she could finish an educational program she had begun. On February 5, 1999 the employing establishment reissued the job offer and on March 1, 1999 appellant returned to permanent light duty.

completely acceptable for appellant and that she should be able to work a full day within these restrictions. Dr. Pfeffer emphasized, however, that as appellant had no objective findings in her upper extremities, all of her present disability is based on subjective factors. In addition, in an addendum to his report, Dr. Pfeffer stated that while appellant had previously been given work restrictions, there were no objective findings at the time of his examination to establish a need for work restrictions or disability for appellant. In an accompanying OWCP-5 work capacity evaluation form, Dr. Pfeffer indicated that appellant could work eight hours a day with no restrictions.

The Board finds that the weight of the medical opinion evidence rests with Dr. Pfeffer's well-rationalized narrative report. He provided a history of injury and appellant's medical history, reviewed the results of early tests, performed a complete physical examination and concluded that appellant could be employed with no restrictions and required no further medical treatment. Therefore, the Office properly relied on Dr. Pfeffer's report in terminating appellant's benefits. The record contains no contrary probative medical evidence to indicate that appellant has any residual disability or need for medical treatment due to her accepted upper extremity conditions. The contemporaneous contrary evidence consists of form reports dated August 12, September 9 and 23, October 21, November 17 and December 8, 1999 from Dr. William H. Johnson, appellant's most recent treating physician, in which he noted that appellant was totally disabled and required further physical and psychological evaluation and treatment, but did not offer any rationalized discussion causally addressing appellant's inability to work to her accepted employment injuries. In addition, while on December 13, 1999 the Office provided Dr. Johnson with a copy of Dr. Pfeffer's May 24, 1999 report and asked him to comment, Dr. Johnson did not respond. As Dr. Pfeffer stated that appellant had no objective signs of disability, could be employed without restrictions and required no additional medical treatment, the Office met its burden of proof to terminate appellant's compensation benefits effective January 4, 2000.

The decision of the Office of Workers' Compensation Programs dated October 14, 1999 is hereby affirmed in part, reversed in part and the case remanded to the Office for payment of additional compensation for appellant's March 15 and 31, 1990, December 3, 1992, December 2, 1993 and January 27, 1995 medical examinations.

The Office's January 4, 2000 decision denying reconsideration and January 4, 2000 decision terminating benefits are hereby affirmed.²⁸

Dated, Washington, DC
April 26, 2002

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁸ Subsequent to both the Office's January 4, 2000 decision and appellant's January 7, 2000 appeal to the Board, appellant requested a hearing before an Office representative and submitted additional evidence in support of her claim. The Board cannot consider this additional evidence, however, as the Board's jurisdiction is limited to reviewing evidence that was before the Office at the time of its final decision. *Mike C. Geffre*, 44 ECAB 942 (1993).